United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1022

To be argued by
TERENCE GARGAN

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1022

AMERICAN FOREIGN STEAMSHIP CORPORATION,
Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE UNITED STATES OF AMERICA

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Statement of the Case

In this action, the United States of America (hereinafter Government) is being sued based on alleged negligence in undocking a privately owned vessel in Okinawa on September 5, 1970.

The vessel owner, American Foreign Steamship Corp. (American Foreign) originally contended that the undocking maneuver by a Government pilot with Government owned tugs, was negligently performed. Subsequently, American Foreign abandoned its original contention that the undocking was negligently performed and adopted the contention that the Government's negligence consisted in its failure to undock the vessel earlier in the day before the weather worsened.

The case was tried before the Honorable Murray I. Gurfein on submission of depositions and documents. The Court below held that the Government was not negligent in executing the undocking maneuver and was not at fault for the alleged late arrival of the assisting tugs. The Court below further held that the striking was a result of weather and sea conditions prevailing during the maneuver and concluded the damage was due to "inevitable accident," and dismissed the complaint against the United States. From this judgment plaintiff now appeals.

Statement of Facts

The *SS American Falcon,* owned by American Foreign was berthed at the Port of Tengan, Okinawa on September 5, 1970, discharging Government owned cargo (6a).[1] The vessel was not scheduled to sail on that day, and no plans had been made for her departure (Defendant's Exhibit A, Capt. Layton's deposition, p. 33).

At approximately 0900 (9:00 A.M.) on September 5, 1970, the wind began increasing in force and the vessel's master, Captain Chaffin called the Harbormaster, a Government employee, and requested extra wire and/or mooring lines to protect his ship. After checking, the Harbormaster informed Captain Chaffin that no extra wire was available. The vessel's Master and Government Pilot Layton then discussed the weather and together decided that the ship would be safer at sea (8a). Whereupon Captain Chaffin requested tugs from the Harbormaster. The Harbormaster then advised Captain Chaffin that the necessary tugs would not be available until 1600 (4:00 P.M.). Tug 531, pressed into service for this unscheduled undocking operation left its berth on the other side of the Island at 1:30 P.M. and after a passage through rough seas arrived alongside the *American Falcon* at 4:30 P.M. to take part in the undocking (Plaintiff's Exhibit 2, Capt. Chaffin's deposition, p. 75).

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[1] Numbers followed by letter "a" refer to pages of joint appendix.

American Foreign does not dispute the findings of fact by the trial court and contends solely that the Government unreasonably delayed the undocking maneuver by not having Tug 531 available earlier in the day.

Before trial, counsel for both sides stipulated that American Foreign would not contend that the Harbormaster knew of or should have anticipated the storm prior to 9:00 A.M. on September 5, 1970; the Government therefore introduced no evidence on the erratic behavior of storms and their lack of predictability in the Western Pacific Ocean. It was stipulated that as of 9:00 A.M. on September 5, 1970, the Harbormaster was aware of the approaching storm.

Issue Presented

Was the District Court in error in its application of the law to its findings of fact not disputed by appellant, in concluding that the Government was not negligent in undocking the *SS American Falcon,* and thus not responsible for the damage sustained.

I. The United States was not negligent in undocking the *SS American Falcon* under the circumstances.

The agreement to furnish assistance in the undocking of the *American Falcon* was entered into orally at approximately 9:30 A.M. or later. The Harbormaster specifically indicated that the tugs would not be available until 4:00 P.M.

Appellant incorrectly states on page 11 of his brief that "the United States of America contractually agreed to supply the necessary tugs within a reasonable time." That statement is clearly in error and is not supported by the evidence of the findings below. The agreement was to furnish the tugs as soon as they were available, viz., 1600 hours. (8a).

The appellant further contends (on page 9 of its brief) that the Harbormaster held the *American Falcon* in port in order to finish discharging cargo in order to save money, and gambled on the safety of this large ocean-going vessel. This argument is completely unsupported by the evidence and indeed absurd.

The simple fact is that the tugs were not available before 1600 hours and no other tug was available before this time. (13a).

The appellant argues (p. 10 of appellant's brief) that since Layton's notebook indicates that he had completed undocking another ship at 0842 (8:42 A.M.) that morning with the help of Tug 531, therefore Tug 531 was available from that time on. Such a conclusion is without basis, and the Court below found as a fact that there was insufficient evidence to establish that the tug was available from 0842 on September 5 (11a). Since the tug was not originally scheduled to undock the *American Falcon,* it is reasonable to infer that she was engaged in other scheduled activities prior to the change in plans. Reasonable inferences may be drawn from common sense and sound judgment under the circumstances of the particular case. *Schulz* v. *Penn RR Co.,* 350 U.S. 523 (1956); *Rech* v. *Pacific-Atlantic SS Co.,* 180 F.2d 866 (2d Cir. 1950); *Casey* v. *American Export Lines,* 173 F.2d 324 (2d Cir. 1948).

Appellant relies on *New York Trap Rock Corp.* v. *Christie Scow Corp.,* 68 F. Supp. 392 (E.D.N.Y. 1946) and the other cases cited to show that towing companies having "dumb barges" in custody have a duty to be aware of weather changes.

Reliance on these cases is misplaced.

In *Trap Rock,* a substantial time elapsed between notice of the storm and the commencement of efforts to move the

scows. The "weather condition, evident on January 23rd, finally built up to its greatest intensity late in the day of January 24th, it may have been too late . . . to save the scow [by this time]." Thus, approximately a 24 hour warning period elapsed, sufficiently long to charge the tug company with negligence.

In *McAllister Bros. Inc.* v. *Penn RR Co.,* 118 F.2d 45 (2d Cir. 1941), the Court at page 46 found that "tugs were available between 11:00 A.M. and 1:00 P.M., and that removal of the 'No. 69' could have been accomplished without risk."

Thus, although the time increment was shortened, equipment was available to do the job.

In *Seaboard Sand & Gravel Corp.* v. *Elmhurst Contracting Co., Inc.,* 68 F. Supp. 169 (E.D.N.Y. 1946), the Court found that "Elmhurst had notice of severe weather to come and . . . the precautions it took were inadequate."

None of these cases relied on by plaintiff apply to the facts of the instant case.

Contrary to appellant's erroneous assertion (appellant's brief, p. 4), there was no weather deterioration on September 4, 1970, the prior day, and there was no knowledge of a typhoon approaching on that day. Notice of the storm was received on the morning of September 5, 1970 (8a).

II. The Court below properly found that the striking was caused without fault and was a result of an inevitable accident.

Liability in a collision is based on fault, the mere fact that a collision occurred has no legal significance. *The Java,* 81 U.S. (14 Wall.) 189 (1873); *The Jumna,* 149 F. 171, (2d Cir. 1906).

The phrase "inevitable accident" has a comprehensive meaning and it is not necessary that the accident should be the result of a vis major. If no negligence can be imputed to either vessel in a collision, there is a presumption that they were navigating in a lawful manner, and the accident may be said to be inevitable. *The Jumna, supra; James River Transport* v. *SS Nashbulk* (S.D.N.Y., N.Y. Law Journal, April 29, 1974).

> "Inevitable accident must be considered as a relative term and must be construed not absolutely but reasonable with regard to the circumstances of each particular case. *The Morning Light,* 2 Wall 550, 17 L.Ed. 862."

In a situation where there is a sufficient showing of fault, as for example, where a vessel under a duty to reverse her engine failed to do so, such fault if unexplained, would be sufficient to result in liability. That vessel would then have the burden of overcoming the presumption of fault created by the failure to reverse. However, the so called "defense" of "inevitable accident" is not a defense at all but rather a presumption after a fact casting the defendant in error has been proven. Gilmore & Black, *The Law of Admiralty,* pp. 396-397.

In the case at bar, no such error on the part of the Government has been proven. The happening of the accident is not such a fact, and the Court below has factually determined that there was no negligence in supplying the tugs at 4:30 P.M.

"Inevitableness is always a condition of fact governed by evidence." *The Anna C. Minch,* 271 F. 192. Consequently, any finding on that subject is primarily a finding of fact depending not only on the facts of the particular case but also upon the existing standard of due care. *Griffin On Collisions,* Sec. 238, p. 538.

The Court below factually determined that the arrangement for tug's services was performed with reasonable dispatch under the circumstances; such a finding is clearly supported by the evidence and should not be disturbed.

CONCLUSION

The determination of the District Court should be affirmed.

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